recognition of and reference to the law of an "extraterritorial domicil." And it is believed that the same holds true equally of the recognition of domicil in an extraterritorial country, in regard to any other of the aspects of domicil.

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NOTES IN PASSING

Perhaps nowhere in the law is there a problem more perplexing to theory, nor one where the decision of a case reflects more sensitively the theory on which the court proceeds, than the matter of the limitation of actions. In *Garabedian v. Avedisian* (1919, R. I.) 105 Atl. 516, the court, after some discussion of conflicting authorities, declared its view that "a judgment is not a contract in any proper sense of that term, and that the rule by which statutes of limitation are tolled by a new promise or part payment does not apply to judgments." Suit had been brought *on a judgment* more than twenty years after it was rendered, but less than twenty years after certain part payments. Recovery was denied.

Why, when a new promise is made, to pay an old contract claim,[1] does the statute start to run anew from the date of the new promise? This seems to be the effect of such a promise, whether or not the statute has already run so as to be a bar. But does suit lie on the old claim or the new? On this the courts conflict. If Massachusetts is sound, in holding the new promise made *after bar* to be enforceable only according to its own terms[2]—then we are dealing here not at all with a "revival" of an old obligation, but with the *creation* of a new and different one. It is the new promise, not the old, which (up to the limit of the old debt) measures the incidents of the promisor's new duty; the existence of the unpaid debt is merely something in the nature of consideration: one sort of inducing cause for a promise, of a sort which makes the latter binding. In simpler language: an old, unpaid debt, whether barred or not, plus a new promise, are the *operative facts* which create a new duty on the promisor, a duty measured by the new promise. This is believed to be the sounder explanation of the results obtained. And it is believed to be good policy, to allow these facts—unpaid debt and new promise—to create such a new substantive duty to pay.

This leads, indeed, to something of an anomaly in our law: a power in a debtor to confer on his creditor (e. g. after the statute has run)

[1] It is not desired to discuss here whether part payment has this operation because it implies a new promise *in fact;* it is assumed, for convenience' sake, that the same principles apply to both forms of "removing the bar of the statute."

[2] *Gillingham v. Brown* (1901) 178 Mass. 417, 60 N. E. 122.

a new right,—to the payment of money,—without the creditor's desire or consent.[3] But surely such a power is no more anomalous than a right which is "an existing continuing cause of action, without any remedy to enforce it"; under which theory the debtor is still admitted to have the peculiar power, by acts done *out of court,* and wholly without connection with the suit, and constituting no estoppel, to "waive" the procedural bar of the statute.

To be sure, our courts have on constitutional law points and in the conflict of laws, pretty much—though by no means consistently—committed themselves to the theory that the statute "goes only to the remedy."[4] But it will be observed that the theory here advanced leaves that position, in those fields, untouched. It is immaterial here, e. g., whether the running of the statute under the local law of the contract leaves a "right" still in existence to be "recognized and enforced" in another forum; and immaterial whether a change in the statute of limitations touches only the remedy, and so does not impair the obligation of contracts. It is here intended to deal solely with the effect of a *new* promise; and to advance the proposition that such new promise leaves the old debt exactly where it found it, but creates a new enforceable duty of its own. If remedy is still available, in any forum, on the old right, sue on it, by all means; if not, sue on the new. The decision in the instant case was wholly sound: the judgment was not revived, nor the statute on its limitation "tolled" by part payment; twenty years have passed, suit on that judgment no longer lies. But, had the part payment been made within, say, the last two years, would not suit have been good, if laid on a new parol promise, supported by the unpaid judgment debt?

A plebiscite postponed to the future always bears the seed of future conflict. Rarely, if ever, has an agreement for a plebiscite to be held at some future time worked satisfactorily. A recent instance is typical of the impracticability of such devices, unless every term and condition of their execution is specifically agreed upon when the plebiscite itself is. At the end of the war between Chile and Peru of 1879-1883, Chile occupied, among other Peruvian territory, the provinces of Tacna and Arica. Article 3 of the Treaty of Peace of Ancon of 1883 provided that Chile was to continue in possession of these Peruvian provinces for ten years, at the end of which time a plebiscite was to be held to determine the final sovereignty, Peruvian or Chilean, of the provinces, the country winning the plebiscite to pay the other ten million Chilean pesos or Peruvian soles, as the case might be. The

[3] But *cf.* the situation of the heir of a decedent; or in some jurisdictions, of a trustee appointed without his knowledge.

[4] See (1918) 27 YALE LAW JOURNAL, 1078; (1919) 28 *ibid.* 492.

parties were to agree at some later time on a protocol fixing the detailed terms of the plebiscite. Since 1892 Peru has endeavored, without success, to secure an agreement on the terms of the protocol. On one ground or another, Chile has thwarted the effort to reach an agreement on these terms, even resisting the submission to arbitration of irreconcilable proposals and counter-proposals. In the meantime, it is charged that Chile has undertaken a consistent policy of Chileanization, by suppressing Peruvian schools, churches and newspapers, and by ousting Peruvian citizens and introducing Chilean immigrants by the thousands. No agreement having yet been reached as to the terms of the protocol, the result is that no plebiscite has been held to this day; Chile, remaining passive, still occupies the provinces in queston; Peru is nurturing a profound hatred against Chile because of what she considers Chilean perfidy, and at any moment the peace of the South-American continent may again be disturbed. Only military weakness has prevented Peru from vindicating by force of arms what she deems her "rights." The principal difficulties that proved irreconcilable involved the questions as to who were to be allowed to vote, old inhabitants or recent immigrants, and who was to control the ballot boxes—factors deemed of some importance by the countries concerned. From this illustration, it will be apparent that among a homogeneous population a plebiscite postponed for a few years must practically always conceal some plan to unduly influence the prospective vote by duress or other device. Unless the exact terms on which the plebiscite is to be held are fixed simultaneously with the agreement for the plebiscite itself, the omission is almost certain to lead to future conflict.

People sometimes do common enough acts at most inopportune moments. Take, for instance, the stopping payment on a check, as in *Hunt v. Security State Bank* (1919, Or.) 179 Pac. 248. A check was received by the drawee bank in the mail, the account looked into, and the check stamped "Paid," and placed upon the spindle. Then the drawer appeared, to stop payment. The cashier "hesitated—seemed nonplussed." Well he might. Then he firmly grasped the wrong horn of the dilemma, and remitted to the correspondent bank. The court held that the processes above described were merely preparation for payment; that the check was not *paid* before actual entry of charge and credit on the books. There is little reason to quarrel with the decision. The normal mode of "payment" of a check is by mere transfer of credits; some one point in the process may properly be fixed, for certainty, at which the payment happens; and that selected in the instant case, of formal entry on the books, seems fully as desirable a one as can be found.

A recent judgment of the English Privy Council in a prize case, *The Palm Branch* (1918, P. C.) 120 L. T. Rep. 101, has decided some novel points of prize law never before adjudicated. In that case, a cargo of cocoa owned by neutrals on a British ship destined to Hamburg was seized at Liverpool early in the war. The cargo was insured up to 97% or so by German underwriters, who paid as for a total loss. The cocoa having been sold, the neutral owners instituted a claim to recover the proceeds. This claim was denied,—notwithstanding the fact that the original seizure was unlawful, as affecting neutral property,—on the ground that from the moment the enemy underwriters paid the loss property in the goods passed to them and the original owners in prosecuting the claim acted merely as trustees for the real owners, the underwriters. To reach this conclusion the President of the Prize Court found no precedent, but reasoned on principle, supported by examples of early prize affidavits which required the claimant to show that the goods claimed *were* at the time of seizure and *are* at the time of claim not enemy owned. This burden the claimant in the instant case could not meet. A somewhat analogous result may be found in the law of replevin, in that a defendant can defeat recovery by pleading title in a stranger, not only at the commencement of suit but at the time of trial.[5] It is admitted that title to goods in the hands of a prize court may pass, and by a change in the political status of the owner goods, which were neutral when seized, may become enemy goods.[6] In a previous case, the antithesis of the instant case had been presented.[7] There goods of the enemy were seized as prize after they had stranded in England. The claim of the neutral underwriter to recover them was denied, on the ground that, having paid the loss after the seizure, his title was subject to the previously acquired claims of the captors. It had long been the rule of English prize courts to disregard intermediate liens on captured vessels or cargo, by way of pledge or mortgage, whether in favor of enemies, neutrals, or nationals.[8] The legal status of enemy insurers of neutral cargo who acquire by subrogation rights of ownership in such cargo is now distinguished from that of contractual lienors.

A man raises the figures of a check, leaving untouched the written words which correspond. Under the N. I. L. sec. 17 (1) where there is a discrepancy between words and figures, the former prevail. Is

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[5] *Bolander v. Gentry* (1868) 36 Cal. 105.

[6] *The Schlesien* [1916] P. 225.

[7] *The Gothland* [1916] P. 239, note.

[8] *The Ariel* (1857, P. C.) 11 Moore P. C. 119; *The Miramichi* [1915] P. 71; *The Odessa* [1916] 1 A. C. 145.

the check-raiser a forger? The tendency of the few cases, as illustrated anew by *McIntosh v. State* (1919, Ga.) 98 S. E. 555, is to hold that he is not. "To be the basis for a prosecution for forgery the alteration must be a material one"; and to be material, "the change must be such that it would affect the legal liability of the parties in an action on the instrument." This being the law of criminal prosecution, save for one dissenting voice in Kentucky, the question arises whether, if the alterer himself should later sue on the altered instrument, for the original amount, the courts would deny of applicability of N. I. L. sec. 124 to defeat his recovery: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided. . . ."

Varium et mutabile semper—judicial comity is an elusive thing; and nowhere more so than in the recognition of *ex parte* decrees of divorce. Since *Haddock v. Haddock*[9] the effect of the full faith and credit clause on such decrees has become difficult to state. So much is sure, however: that there will be few of them which the courts of another state are forced to recognize against their will. Still, most states have judged certainty in marriage matters to be of importance, and have inclined to recognition—through comity—where possible. One can see reason in the chief exception: that the other party to a marriage so "dissolved" shall be given due protection by the courts of the state of which that party is a citizen; and most cases denying recognition have done so at the instance of a citizen thus aggrieved.

But *In re Grossman's Estate* (1919, Pa.) 106 Atl. 86, brings out the fact that such denial may proceed on other—and, it is believed, much less tenable—grounds. Husband and wife, in Pennsylvania, entered into a valid agreement for a separation, in which the wife renounced all rights in her husband's estate. The husband thereupon, after a short visit in Nevada, procured a divorce, returned, and remarried. After his death his second wife set up a claim to the widow's exemption in his estate; her claim was contested only by the children of her husband. The divorced wife was not in the case at all. But the court showed that the Nevada judgment could not affect the rights of the first wife in Pennsylvania, if the courts there cared to refuse it recognition; and concluded from that that the decree "was void so far as it affected the rights of the parties" in that state; or again, that it was "of no effect in this commonwealth." The right to claim widow's exemption belonging exclusively to the one wife recognized as such in Pennsylvania—she had renounced it—the second wife must fail. It would thus seem that such a decree is void in that state not

[9] (1906) 201 U. S. 562, 26 Sup. Ct. 525.

only as against the other spouse, but also as against any heir of the divorcee; and it is a fair inference that this is true of Pennsylvania property, regardless of the citizenship of the heir. But it is submitted that respect for the decisions in another state, and the need for certainty, throughout the country, in all matters relating to marriage, should on sound policy prevail to prevent any person from contesting the decree,—except at the most an aggrieved spouse who, because of domicil or for some other reason, stands under the protection of the forum's laws.

"The lower rank of people," it will be recalled, "who were always fond of their old common law, still claim and exert their ancient privilege" in the matter of the beating of their wives. "So great a favorite"—candor compels us to admit that these words stand a little farther down the page—"is the female sex of the laws." It was some time back that Blackstone wrote,[10] and even then, some creatures of a politer age had begun to doubt the wisdom of the sturdy rule of old. But, praise be, even to-day they are not all dead who love their common law, as witness the fact that *Burroughs v. Crichton* (March 31, 1919, App. D. C.) 60 N. Y. L. J. 530 (May 13, 1919), could come before the courts. The plaintiff brought suit to recover because the defendant surgeon had falsely induced him to *submit his wife* to a dangerous, and as the event proved, fatal surgical operation; "which he would not have done, had the defendant told the truth." It did not appear that the wife did not consent to the operation, nor that it was unnecessary, nor unskilfully performed. The court sustained a demurrer to this count, on the ground that the husband *did not have absolute control over the person of his wife,* as over his chattel. It will be recalled that the right for loss of *consortium* is fading;[11] that married women are no longer protected from the weary burdens of owning property or bringing suit, nor from the dangers of contracting, nor even, in some states, of the polls. And now the instant case: our wife is not our chattel! Whither are we tending? Is the female sex no more the favorite of our laws?

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[10] 1 *Commentaries,* *445.

[11] *Feneff v. New York Central etc. R. R.* (1909) 203 Mass. 278, 89 N. E. 436.